## 47. GRIEVANCES – GRIEVANCE ARBITRATION

### 47.01: Definition and Scope

"No doubt some of the grievances challenged the decisions and activities of certain of the complainant's officers and officials, but such is the nature of grievances. There are few, if any grievances filed by unions or union members that do not challenge **some action or decision of employers or their representatives." ULP #32-86**.

### 47.11: Formal Grievance Procedure – Steps and Time Limits

The only party who can initiate or withdraw a grievance is the aggrieved party. **ULP #1-75**

A grievance concerning salary is a continuing grievance, and each day constitutes in essence a new grievance. Therefore, time limit set for filing a grievance after the event occurs is not applicable. **ULP #3-76**

"The grievance was not a one-time affair that began and ended with McCarvel's request for assistance some seventeen months before he filed his charge. It was a continuing grievance that recurred every day that the Union refused to act. The continuing nature of such a violation has been recognized in federal National Labor Relations Act decisions … by which we are guided …" **ULP #24-77 District Court (1985)**

"In **Young v. City of Great Falls … (1982)** the court held the Board may find a continuing violation after the filing of an unfair labor practice charge. Similarly in this case, McCarvel's complaint could have been amended to include the Union's continued failure to process the grievance after it was filed." **ULP #24-77 District Court (1985)**

"The key question in this case then is whether a final binding decision was made within the procedure of the collective bargaining agreement…. [T]his case, in which the grievance committee deadlocked, is clearly distinguishable from the cases of *Freeman* and *Sear* in which a final decision by the arbitrator or grievance committee relieved the union of further responsibility." **ULP #24-77 District Court (1985)**

"The Union's request that the Hearing Examiner resolve the grievance … in favor of the grievant because the specified time limits have been violated … [is] more appropriately addressed by the arbitrator deciding the merits of the grievance itself." **ULP #5-80**

See **ULP #4-89**.

**47.15: Formal Grievance Procedure – Exhaustion of Remedies**

An unfair labor practice charge was dismissed without prejudice because the Board of Personnel Appeals declines to assume jurisdiction until all remedies available to the grievant have been exhausted. **ULP #18-76**.

"As a general rule, employees wishing to assert contract grievances must attempt to exhaust the contractual grievance/arbitration procedure agreed upon by their employer and union before seeking relief elsewhere, ***Republic Steel Corporation vs. Maddox*, 58 LRRM 2193, 379 US 650 (1965)**; ***Brinkman v. Montana*, 1 IER 1236, 72 9 P.2d 1301 (19486)**." **ULP #14-87**.

See also **ULPs #19-88 and #4-89**.

**47.17: Formal Grievance Procedure – Refusal to Comply with Settlement [See also 72.713.]**

See **ULP #39-80**.

**47.18: Formal Grievance Procedure – Mandatory Submission to Arbitration**

Submission of issues to arbitration (Section **39-31-310**) is permissive, not mandatory. **ULP #3-79 Montana Supreme Court (1982)**

See also **ULP #7-80**.

**47.21: Refusal to Process or Answer – By Union [See also 23.2 and 73.51.]**

The Collective Bargaining for Public Employees Act provides no remedy for a union allegedly breaching a duty it owed to a member "by its failure to fairly represent a grievance. Section **39-31-402, MCA** does not encompass this situation." The Supreme Court held that the District Court (as opposed to the federal court) had jurisdiction. **Ford v. University of Montana (1979)**

Montana Supreme Court Justices "still recognize the holding in Ford that a District Court has original jurisdiction to hear claims that a union has breached its duty of fair representation. [They] no longer recognize, however, the dicta in Ford which states that a breach of the duty of fair representation is not an unfair labor practice within the meaning of Section **39-31-401, MCA**. Further, [they] no longer recognize other dicta in Ford which states that finding jurisdiction in the Board of Personnel Appeals on these matters would necessarily deprive the District Court of jurisdiction…. [They] therefore [held]that the Board of Personnel Appeals has jurisdiction to hear claims that a union has breached its duty of fair representation." **ULP #24-77 Montana Supreme Court (1981)**

"Though it is recognized the union does not have to take every grievance to arbitration, it clearly cannot arbitrarily refuse to process, or process in a perfunctory manner, a reasonable and meritorious grievance." **ULP #24-77 District Court (1985)**

**47.22: Refusal to Process or Answer — By Employer [See also 47.83, 47.87, 72.71, and 72.76.]**

See **ULPs #27-87, #19-88, and #4-89**.

**47.221: Refusal to Process or Answer — By Employer — Timeliness as Basis**

See **ULP #19-88**.

**47.222: Refusal to Process or Answer – By Employer – Other Procedural Defects as Basis [See also 47.83, 47.87, 72.71, and 72.76.]**

See **ULPs #19-79 and #5-80**.

**47.223: Refusal to Process or Answer – By Employer – Subject Matter as Basis**

The employer's feeling that no provision of the contract is being addressed in the grievance does not make the dispute nonexistent. Such reasoning is not acceptable grounds for refusing to participate in the grievance process. **ULP #1-75**

"The Department of Highways has breached its contract covering Plaintiff's members by refusing to abide by the recognition provision and refusing to submit the resulting grievance to arbitration." **DC #5-75 District Court (1979)**

"Management rights" as the subject matter of a grievance arbitration does *not* constitute grounds for the employer to refuse to participate in arbitration as specified in the contract. **ULP #3-76**

"Had the School Board established an attendance policy applying to every member under the union contract then the unilateral initiation of a more dependable method to enforce this attendance policy would have been merely a change from the established rule…. [It] would have been a managerial prerogative…. The facts of this case do not lead to that conclusion. The School Board initiated additional rules, substantially changing old rules on the same subject." Therefore, the change was subject to mandatory and binding arbitration. **Butte Teachers' Union v. Silver Bow School District (1977)**

In **ULPs #1-75 and #3-76**, "this Board held that when an employer agrees to a grievance procedure, culminating in final and binding arbitration, its refusal to submit a grievance to arbitration is a refusal to bargain in good faith. That

position was modified so that this Board would look to the collective bargaining contract to see if the parties agreed to process the grievance in dispute, and in cases of doubt the grievance will be ordered processed." **ULP #7-80**

See also **ULP #30-79** and **Montana Supreme Court (1982).**

"Ms. Bagnell was a member of the Union in good standing but under the unmistakable provisions of [the] contract may not grieve her termination because she was probationary." **ULP #24-92**.

"The exclusion language in this case is very clear and expressly excludes dismissed formerly probationary employees from use of the Collective Bargaining Agreement Grievance Arbitration Procedure." **ULP #24-92**.

See also **ULP #27-87**.

**47.311: Individual Rights – Right to Representation – In Investigatory or Disciplinary Interview [See also 72.335.]**

"In 1975, the United States Supreme Court agreed with the National Labor Relations Board and reversed the fifth circuit court establishing what has come to be known as the Weingarten rule. [**NLRB v. Weingarten, 420 U.S. 251 (1975), 88 LRRM 2689**; see also **ILGWU v. Quality Mfg. Co. decided the same day, 88 LRRM 2698**.] The Court agreed with the National Labor Relations Board that employee insistence upon union representation at an employer's investigatory interview, which the employee reasonably believes might result in disciplinary action against him, is protected concerted activity." **ULP #16-81**

The "Board of Personnel Appeals first used the principle of Weingarten in … **ULP #16-81** …. [T]he test is: (1) The employee who is being disciplinary interviewed has to ask for union representation. A union representative cannot ask for an employee. (2) The employee or the employee requested union representative may then ask for a pre-interview conference with the employer to determine the nature of the interview. (3) The employee and the union representative then are entitled to a private conference before the interview. (4) At both the pre-interview conference and the interview the union representative is free to speak." **ULP #5-84**

See also **ULPs #37-76, #41-76, and #42-79**.

**47.32: Individual Rights – Recourse to Outside Forums and Remedies**

"The Employer alleges that Section **7-32-4164 MCA** is the Union's exclusive remedy. The Board cannot agree with the Employer's assertion of exclusivity because it would limit the rights of public employees under the Collective

Bargaining for Public Employees Act …. The two remedies—final and binding arbitration and Section **7-32-4164 MCA** – may not be exclusive remedies." **ULP #18-83**

"Only in cases where it is certain that the arbitration clause contained in a collective bargaining agreement is not susceptible to an interpretation that covers the dispute is an employee entitled to sidestep provisions of the collective bargaining agreement." Small v. McRae (1982)

"We do not read the Freeman case to mean an individual employee loses his grievance rights under a collective bargaining agreement when the agreement also permits his independent action." **ULP #24-77 District Court (1985)**

**47.512: Grievance Arbitration — Authority to Initiate Arbitration — By Employer**

See **ULP #20-86**.

**47.521: Grievance Arbitration – Arbitrability – Scope of Arbitration**

"An arbitrator, therefore, merely has to determine whether or not the procedure agreed to by the parties was properly used in the termination of the non-tenured teacher. The basis of the dismissal is not a subject of review by the arbitrator." **ULP #30-79**

"[A] grievance based upon the misapplication or misinterpretation of a negotiated item" (wages in this case) is arbitrable. **ULP #7-80**

See also **ULP #19-79**.

**47.522: Grievance Arbitration – Arbitrability – Procedural Issues**

See **ULP #5-80**.

**47.53: Grievance Arbitration — Duties of Parties**

"Pursuant to Section 39-31-401(5) the Defendant was obligated to bargain collectively in good faith with the American Federation of State, County and Municipal Employees, AFL-CIO, its Montana Council No. 9 and Local No. 256. That obligation to bargain in good faith includes the duty to comply with the grievance/arbitration procedure contained within the existing Collective Bargaining Agreement, ***Chicago Magnesium Castings Company vs. NLRB*, 103 LRRM 2241, 612 F.2d 1, CA 7 (1980)**; ***NLRB vs. Southwestern Electric Cooperative, Inc.*, 122 LRRM 2747, 794 F.2d 276, CA 7 (1986)**." **ULP #14-87**.

**47.54: Grievance Arbitration – Deferral to Arbitration by Board of Personnel Appeals [See also 71.8, 71.81, and 71.82.]**

The Board of Personnel Appeals and its agents assumed that they did not have the power to defer matters to arbitration in **UL #5-75**. However, the Board realized it had such authority under the provisions **59-1607, RCM 1947** and so stated in **ULP #13-78** and other ULP decisions.

Complaints *were* remanded to grievance arbitration procedures in **ULP #13-78**.

Complaints *were not* remanded to grievance arbitration procedures because the procedures did not culminate in final and binding arbitration in **ULPs #3-79, #34-80, #18-81, and #19-81**.

The Hearing Examiner did not defer the case to the contract grievance procedure for the following reasons. "The grievance procedure provided in the contract does not culminate in a final binding decision…. This charge also involves an alleged violation of complainant's basic rights under **39-31-401(1) MCA**…. The City's conduct with respect to abiding by the settlement reached on the grievance filed by Mr. Young does not lead one to conclude that a stable collective bargaining relationship exists between the parties. There was no indication of a willingness on the part of the City to arbitrate." **ULP #3-79**

"The Board deferred ruling on the issue of whether or not it has jurisdiction to defer a pending unfair labor practice charge to arbitration. The Board reserved ruling on this issue for another case." ULP

It was inappropriate to defer the matter before the Hearing Examiner because "the complaint alleges that the District did interfere with the operation of the contract's grievance procedure by refusing to strike names on an arbitration list." **ULP #5-80**

"[T]he fact that both parties filed unfair labor practice charges and moved to have them consolidated for hearing and decision coupled with the nature of the charges reinforces those reasons [to decline deferral for reasons according to the Collyer Doctrine]." **ULP #19-80**

"There is nothing on the record to suggest that the arbitration award made in this case did not meet all the prerequisites of the Spielberg doctrine….[The Board of Personnel Appeals will] defer to the award and require that Complainant seek enforcement in the courts." **ULP #39-80**

"[T]he matter was not deferred under the Collyer Doctrine because the charge was brought by the Employer, who had no recourse to the contract's grievance procedure, and because the parties' contract did not provide for binding arbitration…." **ULP #18-81**

"The Board clearly has the authority to hear this complaint under the provisions of **39-31-403, MCA**. However, it is determined that the policies and provisions of the Act would best be effectuated if this Board were to remand this complaint to the grievance-arbitration procedure specified by the collective bargaining agreement of the parties." **ULP #43-81**

See also **ULPs #27-82and #3-83** and **ULP #3-79 District Court (1981)** and **Montana Supreme Court (1982)**.

"This matter is not deferred to the party's grievance-arbitration procedure under the holding of the NLRB in ***United States Postal Service and Northwest Louisiana Area Local, Postal Workers, AFL-CIO*, 15-CA-7762 (p) 1984,270 NLRB 149**, because the City of Missoula refused to comply with the grievance settlement. Such refusal amounts to a renunciation of the entire collective bargaining process in violation of Section 39-31-401(5), MCA and therefore the matter is not appropriate for deferral." **ULP #6-86**.

"Because the Defendant and AFSCME have contracted to have their disputes resolved by an arbitrator of their choosing, it is inappropriate for the Board of Personnel Appeals to become involved in a dispute which is more suitable for resolution through the grievance/arbitration procedure contained within the Collective Bargaining Agreement, see ***United Paperworkers International Union vs. Misco, Inc.*, 126 LRRM 3113, US SupCt., 12-1-87, No. 86-651**; ***AT&T Technologies vs. CWA*, 121 LRRM 3329, 475 US 643 (1986)**." **ULP #14-87**

"The arbitrator's award is not dispositive of the allegation that the Defendant committed an unfair labor practice, see ***Nevins v. NLRB*, 122 LRRM 3147, 796 F2d 14, CA 2 (1986)**; ***Taylor v. NLRB*, 122 LRRM 24, 786 F2d 1516, CA 11 (1986)**; ***Grand Rapids Die Casting v. NLRB,* 126 LRRM 2747, CA 6 (1987)**." **ULP #17-87**.

"Arbitration following an employer's effectuation of a change in a term or condition of employment does not serve as a substitute for bargaining over whether such a change should be implemented in the first place, ***NLRB v. Merrill and Ring, Inc.*, 116 LRRM 2221, 731 F2d 605, CA 9 (1984)**." **ULP #17-87**.

"The National Labor Relations Board deferred to the grievance-arbitration procedure in ***Teamsters Local 70 and National Biscuit Company*, 80 LRRM 1727, 198 NLRB No. 4, July 31, 1972** where the procedure was similar to that contained in the Collective Bargaining Agreement between the parties in this matter." **ULP #19-88**

"In **ULP 44-81** *James F. Forsman, IAFF Local No. 436 v. Anaconda Deer Lodge County* and **ULP 43-81** *William M. Converse, IAFF Local No. 436 v.*

*Anaconda Deer Lodge County* (April 20, 1982) the Board of Personnel Appeals deferred Unfair Labor Practice Charges to the Collective Bargaining Agreement's grievance-arbitration procedure. In doing so the Board formally adopted the *Collyer* doctrine. In ***Young, et al v. City of Great Falls*** **[related to ULP #3-79], 112 LRRM 2988, 1948 Mont. 349, 646 P.2d 512** the Montana Supreme Court described that doctrine...." **ULP #19-88**. See also **ULP #4-89**.

"The Board of Personnel Appeals has a long standing tradition of not interpreting or enforcing contract language if resolution is possible through the grievance procedure." **ULP #4-89**.

"In the absence of deferral as a defense the NLRB has declined to defer to arbitration under *Collyer*.... See for instance, ***NCR Corporation and Airline and Steamship Clerks*****, 117 LRRM 1062**." **ULP #14-89**

**47.55: Grievance Arbitration – Deferral to Arbitration by Courts [See also 71.83.]**

"Only in cases where it is certain that the arbitration clause contained in a collective bargaining agreement is not susceptible to an interpretation that covers the dispute is an employee entitled to sidestep provisions of the collective bargaining agreement." **Small v. McRae (1982)**

See **ULPs #6-86, #14-87, #17-87, #19-88, #4-89, and #14-89**.

**47.56: Grievance Arbitration – Public Policy**

"Section **17-807, RCM 1947** does not prohibit the enforcement of an agreement to arbitrate grievances in a contract between a public employer and a labor organization representing the public employees of an employer." **DC #5-75 District Court (1979)**

"Defendant Department [of Highways] is hereby ordered to recognize Plaintiff, Joint Council of Teamsters, as the representative of its maintenance employees in Glacier and Toole Counties, upon presentation of evidence a majority of such employees in each county are members of Plaintiff organization; or, in the alternative Defendant Department is ordered to submit the dispute relating to recognition of Plaintiff, Joint Council of Teamsters, as representative of its maintenance employees in Glacier and Toole Counties, to final and binding arbitration as provided in Article XIII of the collective bargaining agreement, Joint Exhibit "A"**DC #5-75 District Court (1979)**

**47.61: Arbitrator – Selection and Appointment**

"[T]he District was in breach of contract when it refused to strike names from the arbitration list." **ULP #5-80**

See also **ULP #5-80 District Court (1981).**

**47.62: Arbitrator — Authority**

"[T]he Courts have recognized the concept of dual jurisdiction between the arbitrator and the NLRB, ***NLRB v. Huttig Sash and Door Co.*, 377 F.2d 964,** relying upon ***NLRB v. C & C Plywood*, 87 S. Ct. 559, 64 LRRM 2065 (1967).**" **ULP #14-89**.

**47.73: Grievance Arbitration Procedure — Time Limits**

"[T]he collective bargaining agreement's grievance-arbitration machinery has no time limits between step 1 and step 2. It is conceivable that the Complainant could yet, at this late date, file a timely request to move the grievance on to the second step of the grievance procedure and a hearing with the Joint Labor Management Committee." **ULP #19-88**

See also **ULP #4-89**.

**47.83: Grievance Arbitration Awards – Refusal to Comply [See also 47.22, 47.87, 72.71, 72.76, and 73.51.]**

"Any questions relating to possible non-compliance with all steps of the grievance procedure may be submitted to an arbitrator." **DC #5-75 District Court (1979)**

See also **ULPs #2-74, #11-78, and #39-80** and **Savage Education Association v. Richland County School Districts (1984).**
"Following resolution of the grievance at step one the city is precluded from unilaterally withdrawing agreement or refusing to proceed with the resolution agreement. See ***Bear Company*, 231 NLRB No. 41, 96 LRRM 1123 (1977)**." **ULP #6-86**.

"In ***Standard Oil Company (Indiana)*, 13 LA 799** at p.800, the Board of Arbitrators stated a principle applicable in the present case. 'It is essential to good labor management relations in this plant that grievance settlements not be disturbed in the absence of conclusive showing of changed conditions. The union failed to show sufficient evidence that the condition...has changed in such a material manner as to warrant the Board of Arbitration setting aside the grievance settlement." **ULP #6-86**.

**47.85: Grievance Arbitration Awards — Finality**

"The arbitrator's award is dispositive of the contractual dispute and that award stands insofar as it does not conflict with the law, see ***United Paperworkers International Union v. Misco, Inc.*, 126 LRRM 3113, U.S. Supreme Court,**

**12-1-87, 86-651**; ***A T & T Technologies v. C W A*, 121 LRRM 3329, 475 U.S. 643 (1986)**; and ***Postal Workers v. Postal Service*, 122 LRRM 2094, 7948 F2d 1, CA DC (1986).**" **ULP #17-87**

**47.86: Grievance Arbitration Awards – Review**

See **Savage Education Association v. Richland County School Districts (1984).**

**47.87: Grievance Arbitration Awards – Enforcement [See also 47.22, 47.83, 72.71, 72.76, and 73.51.]**

Failure to implement an arbitration award does not constitute an unfair labor practice. Enforcement must be gained through suit in a court of law. **ULP #2-74**

An arbitrator reinstated terminated nontenured teachers with back pay after the school trustees failed to comply with contract termination procedures. The arbitrator's award was appropriate for the following reasons. (1) In **Savage Public Schools v. Savage Education Association (1982)**, the Montana Supreme Court held that, whether or not the trustees had complied with the contract procedural requirements, the matter was subject to arbitration. Failure to submit the dispute to arbitration was an unfair labor practice, rendering the trustees' argument that they were not authorized to proceed to that step meritless. (2) The collective bargaining agreement's procedural guarantees and its grievance procedures (which culminated in arbitration) were conditions of employment. Therefore such procedures were proper bargaining subjects which mandated that the trustees be bound by their good faith contract representations. (3) The trustees advanced no legitimate grounds to vacate or modify the arbitrator's award. (4) The arbitrator's award was rational and appropriate, although no express contractual remedy was stated. **Savage Education Association v. Richland County School Districts (1984)**

See also **ULP #39-80**.